Nos. 22,441 and 22,441-A

United States Court of Appeals

For the Ninth Circuit

SHELL OIL COMPANY, *Appellant,* vs. RUSSELL L. JONES, et al., *Appellees.*	No. 22,441
RUSSELL L. JONES, et al., *Appellants,* vs. SHELL OIL COMPANY, *Appellee.*	No. 22,441-A

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANTS (IN No. 22,441-A); (APPELLEES IN No. 22,441)

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ARGUMENT

I

COURTS SHOULD CONSIDER THE RELEVANT CONSTITUTIONAL POLICIES OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IN PROTECTING LITIGANTS FROM ANNOYANCE, EMBARRASSMENT AND OPPRESSION WHICH RESULTS FROM AN ABUSE OF PRE-TRIAL DISCOVERY. THUS, PROTECTIVE ORDERS SEALING DEPOSITION TESTIMONY AND INTERROGATORY ANSWERS PURSUANT TO RULES 30(b) AND 33 ARE NECESSARY IN THE PRESENT CASE.

A. In its Reply and Answering Brief, Shell Oil Company urges this Court to ignore the "potential" privilege

against self-incrimination considerations raised by plaintiffs in seeking a protective order sealing depositions and interrogatory answers. Shell instructs the Court not to "anticipate a question of constitutional law in advance of the necessity of deciding". (Reply Brief, p. 1).

The plaintiffs have not invoked their privilege against self-incrimination. Moreover, the plaintiffs wish to avoid the necessity of asserting that privilege. They desire to cooperate with Shell in its program of discovery. However, this cooperation cannot be realized so long as plaintiffs live in fear of the danger that information which is developed in the process of civil pre-trial discovery may be utilized by the Government in the related pending criminal prosecution.

This is the type of "oppression" which Rule 30(b) (and Rule 33) of the Federal Rules of Civil Procedure must guard against. *United States v. Simon,* 373 F. 2d 649, 654 (2nd Cir. 1967); *United States v. American Raditor & Sanitary Service Corp.,* 1967 Trade Cases ¶72,311 (3rd Cir. 1967).

It seems most incongruous to permit protective orders to be used to seal trade secrets and yet refuse such protection to preserve so important a constitutional liberty as the privilege against self-incrimination. A long line of decisions have recognized this need and have utilized protective orders to prevent oppressive self-incrimination. *Campbell v. Eastland,* 307 F. 2d 478 (5th Cir. 1962); *Harrigan & Sons v. Enterprise Animal Oil Co.,* 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp. v. Holzbaugh,* 13 F.R.D. 236 (E.D. Mich. 1952); *Perry v. McGuire,* 36 F.R.D. 272 (S.D. N.Y. 1964); *United States v. Parrott,* 248 F. Supp. 196 (D.C. 1965).

B. Shell's contention that the time is not ripe for an assertion by plaintiffs of their privilege (Reply Brief pp. 2, 3) is erroneous. Shell cites *Brown v. United States,* 356 U.S. 148 (1958) as authority for the rule that the privilege may not be asserted in advance of questions actually propounded (Reply Brief p. 2). Shell seems to have ignored the fact it has already propounded twenty (20) interrogatories, and that seven (7) of those interrogatories call for answers which could yield incriminatory information (see Brief for Appellees in No. 22,441 and Appellants in No. 22,441-A, Appendix C).

This Court has consistently held, following *Hoffman v. United States,* 341 U.S. 479 (1951), that the assertion of the privilege is justified under such circumstances. *Hashagen v. United States,* 283 F. 2d 345, 348 (9th Cir. 1960).

Indeed, on January 29, 1968, the United States Supreme Court re-affirmed the broad protective scope of the privilege. *Marchetti v. United States,* ..... U.S. ....., 88 S.Ct. 697 (1968); *Grosso v. United States,* ..... U.S. ....., 88 S.Ct. 709 (1968). The Court indicated, in these cases, that where individuals are required to reveal information that could ". . . significantly enhance the likelihood of their prosecution . . ." or ". . . readily provide evidence which will facilitate their convictions . . ." the privilege may be justifiably asserted (88 S.Ct. at p. 706). The duty to reveal information ends when the threat of incrimination appears.

Thus, even though plaintiffs have not yet actually invoked the privilege, they are presently entitled to do so in the absence of the issuance of Protective Orders.

C. Shell argues that the plaintiffs may not prosecute this litigation and at the same time assert their constitutional privilege (Reply Brief pp. 2, 3). In making this argument, Shell again attempts to distort the nature of this case. Plaintiffs do not desire to use their privilege against self-incrimination as a means of avoiding proper pre-trial discovery. Plaintiffs merely seek a protective order so as to insure that their own testimony given during pre-trial discovery will not become the evidence against them in a criminal case.

It is immaterial that the Protective Orders are being sought by parties plaintiff in the present case. Rules 30(b) and 33 do not limit eligibility for protective orders to defendants in a civil case. These rules provide protective orders for "any party" who demonstrates, as plaintiffs have in this case, that unsealed pre-trial discovery will cause oppression. F.R. Civ. Proc., Rules 30(b), 33. The plaintiffs justifiably fear that the information they reveal during pre-trial discovery will be improperly and oppressively used by the Government in its criminal prosecution. Thus both requested Protective Orders must be granted.

D. Shell urges that plaintiffs have a duty to cooperate in the discovery process (Reply Brief p. 5). Obviously this duty cannot supersede the right to remain silent in the face of questions which call for incriminatory information.

Shell, then, seems again to be implying that plaintiffs must elect or choose between asserting their constitutional privilege and going forward with this lawsuit. Such an

"election" or coerced waiver of the privilege would clearly be an unconstitutional abridgment of the Fifth Amendment. *Spevack v. Klein,* 385 U.S. 511 (1967); *Garrity v. N. J.,* 385 U.S. 493 (1967). The United States Supreme Court has expressly invalidated such procedural devices which exact a penalty for the assertion of the privilege. *Spevack v. Klein, supra.* Requiring plaintiffs to abandon their civil antitrust claim as the price for preserving and asserting their right to silence would, therefore, be tantamount to exacting an unconstitutional penalty for the exercise of the Fifth Amendment liberty. Such a contention is especially untenable in the present case where the entire "discovery *vs.* silence" dilemma can be avoided through issuance of the Protective Orders. The policy underlying the Fifth Amendment privilege should be read into Rule 30(b) thereby compelling the issuance of the Protective Orders sought by the plaintiffs.

E. In this case then, the Protective Orders can serve a function similar to that of an "immunity provision". *Cf. Albertson v. Subversive Activities Control Bd.,* 382 U.S. 70 (1965). The Orders permit Shell to discover facts which are relevant to the issues in the civil antitrust case, but it *prevents* the improper use of this information in the criminal prosecution by the Government. Indeed, the *Albertson* case requires a showing of such "immunity" as a condition to overriding the privilege and compelling disclosure of information. The Protective Orders sought by the plaintiffs, then, represent the minimum amount of protection to which they are entitled.

In deciding this Appeal, three competing interests must be considered and weighed:

(a) the *legislative* policy in favor of private civil antitrust enforcement (*Lawlor v. National Screen Serv. Corp.,* 349 U.S. 322 (1955); *Olympic Ref. Co. v. Carter,* 332 F. 2d 260 (9th Cir. 1964));

(b) the *procedural* policy in favor of liberal pre-trial discovery in civil actions (Sunderland, The New Federal Rules, 45 W. Va. L.Q. 3 (1938); and

(c) the *constitutional* policy which protects individuals from compulsory self-incrimination. *Malloy v. Hogan,* 378 U.S. 1 (1964); *Hashagen v. United States, supra).*

Issuance of the Protective Orders requested by plaintiffs then becomes the only means of reconciling and resolving these competing interests and policies in the present case. With the Protective Orders, the civil action can proceed, pre-trial discovery may be conducted, and the plaintiffs' privilege against self-incrimination will be protected. Most important, however, the Government will be precluded from the improper utilization of the fruits of the civil discovery. As numerous cases have concluded, no other effective and reasonable alternative exists for resolving this apparent dilemma. *United States v. American Rad. & San. Service Corp., supra; United States v. Simon, supra; Independent Prod. Corp. v. Loew's,* 283 F. 2d 730 (2nd Cir. 1960).

II

THE REQUIREMENT THAT SHELL RETURN ALL COPIES OF PLAINTIFFS' DEPOSITIONS UPON TERMINATION OF THIS LITIGATION IS REASONABLE, AND DOES NOT CONSTITUTE A DEPRIVATION OF SHELL'S PROPERTY WITHOUT DUE PROCESS OF LAW.

Finally, plaintiffs urge this Court to reject Shell's contention that the portion of Judge Weigel's Order which requires Shell, upon the termination of this litigation, to return all copies of depositions to plaintiffs, constitutes a deprivation of property without due process of law.

Rule 30(b) gives the Trial Court extensive discretion in fashioning effective orders and in preventing potential annoyance, embarrassment or oppression of any party to the litigation. Where Protective Orders are concerned, the Court must attempt to preserve the secrecy and confidentiality of the documents discovered. After the litigation is terminated, the Court loses effective control over the parties thereto—the Court would not be fully capable of enforcing its Protective Orders against the party in possession of the confidential information. Thus, requiring the return of the confidential documents is the only means of insuring that improper use is not made of the information therein contained.

Moreover, upon the termination of this litigation, the plaintiffs' depositions would no longer be of value or use to Shell. If, as Shell suggests, they become important in future litigation, then Shell can petition the Court for a return of the depositions. Under these circumstances, the Court would once again be able to effectively guaran-

tee that the confidentiality of the documents will be maintained.

Shell has failed to cite any authority whatsoever for its unique "due process" argument. When urging that one has been deprived of property without due process of law, the burden of showing unconstitutionality is upon the challenging party. *Nebbia v. New York,* 291 U.S. 502 (1934). Under the Fifth Amendment, all that is required is the existence of a rational basis for the regulation of the individual's economic or property right. *United States v. Carolene Products Co.,* 304 U.S. 144 (1938). *Cf. Day-Brite Lighting Co. v. Missouri,* 342 U.S. 421 (1952).

There being a rational basis for Judge Weigel's order that the depositions be returned, Shell has failed to prove that the order deprives them of property without due process of law.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the plaintiffs' earlier brief (Brief for Appellees in No. 22,441 and for Appellants in No. 22,441-A), this Court should affirm Judge Weigel's order sealing deposition testimony in No. 22,441 and reverse Judge Sweigert's denial of a protective order in No. 22,441-A.

Dated, February 26, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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